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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

**TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS**

**BEFORE THE HONORABLE AMY TOTENBERG**

**UNITED STATES DISTRICT SENIOR JUDGE**

**NOVEMBER 15, 2023**

**3:31 P.M.**

***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

***TRANSCRIPT PRODUCED BY:***

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**P R O C E E D I N G S**

**(Atlanta, Fulton County, Georgia; November 15, 2023.)**

THE COURT: Good afternoon. This is Judge Totenberg.

I think somebody else just joined. Who is that?

MS. LaROSS: Diane LaRoss.

THE COURT: Thank you very much.

We're here for a telephone conference in Curling, et al. v. Raffensperger, et al., Case Number 1:17-CV-2989.

I wanted just to talk actually just fairly briefly about where we are in the process of our getting ready for trial. And I took out our little schedule that I had filed previously on the 13th of October. So I was sort of wanting to circle back to this and also had some observations about things in the -- items in the schedule that seemed not necessarily needed. But obviously I haven't given you a ton of time to prepare for trial. But that is where we're at.

If you have any items that you want to raise, you should obviously feel free to do so. I know there have been other conversations spurred in light of the order, and I leave that for you to handle with Mr. Gonzalez as you see fit. And if I can be of any help, of course, I would be.

The things I was looking at -- the case events was just kind of straightforward. Since this is not a jury trial, it seemed to me that some of the spots where we had allowed for motions in limine might not really be necessary and would just

1 take up time for you that is not necessary since it is a bench  
2 trial.

3 And I wasn't sure really what the issues were around  
4 the necessity of objections to depositions. But I don't know  
5 how you're using the depositions. And I wanted to know also  
6 what your thoughts are about how long the trial would be and  
7 what else I can do to assist you in structuring this so that it  
8 is in any way more pragmatically arranged and efficient.

9 So those are the sort of immediate matters I wanted  
10 to talk about. Because since we had deadlines for bunches of  
11 the motions in limine being ruled upon and the objections to  
12 the depositions, that was probably the biggest concern to me  
13 was how long we thought it would take to try this.

14 MR. CROSS: This is David Cross. My partner, Mary  
15 Kaiser, is going to take most of these issues.

16 But the one thing I will say -- and Bruce or someone  
17 can jump in. I think we're in agreement on the plaintiffs'  
18 side. Having talked about it and having conferred with the  
19 defendants, I think we agree that we do not need motions in  
20 limine. We had made the same point to the defendants that you  
21 just made, that it is a bench trial. It seems much more  
22 efficient to take up evidentiary issues during the course of  
23 the trial as they arise with the Court.

24 So I think unless Bruce has a different view that we  
25 would take that off calendar and not have those motions.

1 MR. BROWN: This is Bruce Brown. I would agree  
2 100 percent.

3 THE COURT: And where is the State on that?

4 MR. TYSON: This is Bryan Tyson. I'll begin. And I  
5 apologize. I know that I was in trial and had been kind of out  
6 of the loop of some of the conversations we've had. Mr. Miller  
7 may recall.

8 I wasn't sure that we said we weren't going to file  
9 any motions in limine, and I believe we might need at least  
10 some scope-type of issues. Also I know we've had -- beginning  
11 the witness list and things like an exhibit list and things  
12 like that. There may be some things that I thought we might  
13 need to discuss.

14 But maybe Mr. Miller or somebody else can recall  
15 specifically on that because I don't think I was part of all  
16 those conversations. So I'm sorry about that.

17 THE COURT: That's fine.

18 MR. MILLER: Your Honor, this is Carey Miller. The  
19 last time we spoke with plaintiffs' counsel on this was  
20 obviously before the Court's order on summary judgment. I  
21 think at this juncture the State is not in a position to  
22 concede or waive the ability to file motions in limine that is  
23 not else particularly related to the scope of the evidentiary  
24 issues necessary for trial.

25 Maybe some of that gets sussed out as the pretrial

1 proceedings go along. But as we stand right now, we don't  
2 believe that we would be able to agree to that.

3 THE COURT: All right. Well, right now it is on the  
4 schedule that motions would be filed by the 11th of December  
5 and the responses by December the 18th and replies by the 22nd.

6 My concern about that is I'm not here -- I mean, I'm  
7 not sure the issues will arise the first day. But I don't  
8 think I'm going to be in a position to review these  
9 instantaneously or that my law clerks are, given there being --  
10 the replies are going to be Friday 22nd and that is likely the  
11 end of the day too. So --

12 MR. CROSS: Your Honor, this is David -- sorry.

13 THE COURT: No. That's fine.

14 So my only thoughts about that was if we are going to  
15 do this and have -- and for you to have any expectation that  
16 we're going to get responses before -- to you before the  
17 beginning of trial, I think we would have to try to get these  
18 done a little bit earlier.

19 MR. CROSS: Your Honor, one suggestion I would  
20 make -- sorry. Sorry, Judge.

21 Can you hear me?

22 THE COURT: Yes.

23 MR. CROSS: Sorry. My headphones died.

24 One suggestion I would make that I've had in other  
25 trials and Your Honor might consider here, particularly since

1 it is a bench trial, is that I have had other judges require  
2 the parties to just provide a list of the topics that they  
3 would intend to file motions in limine on and then the judge  
4 has to authorize whether they file. And that might be useful  
5 here. Because the one example I can recall from when we  
6 conferred with the State was that they suggested, for example,  
7 they might file a motion in limine on the Coffee County breach.

8 I would think -- I don't know if that is still on the  
9 table, if they are contemplating it. I would think Your  
10 Honor's recent order makes clear that that is a key part of the  
11 case.

12 But it may be that if each side just sends the list  
13 of what they are contemplating Your Honor can look at that and  
14 say, this isn't something that the parties need to spend time  
15 briefing on. Or if it is, then we know that there's some  
16 discrete set that we can all move quickly on. And, you know,  
17 both sides could get those lists in maybe within the next week.

18 THE COURT: Well, I think it is a good idea. But --

19 MR. MILLER: I'm sorry.

20 THE COURT: -- I mean, obviously counsel probably  
21 need to think about it. But I think it is a good idea from the  
22 perspective of, even if you are providing a one paragraph  
23 description of the issue, then at least everyone can say -- for  
24 instance, maybe there's something that you want to make sure --  
25 that the State doesn't want to come in about some particular



1 item, at least it is something you-all could discuss because it  
2 might be something you could resolve without me.

3 MR. BELINFANTE: I think, you know, certainly  
4 communication -- sorry. This is Josh Belinfante.

5 Certainly communications between counsel is something  
6 we would entertain and do and hopefully resolve the issue.

7 But I think that part about the motions in limine  
8 raises another, perhaps more substantive issue, which is, if  
9 Dr. Halderman is going to testify about his malware, we haven't  
10 seen it. And we have tried. And we have not been granted  
11 access to it. And I think that that could be, potentially at  
12 least, a material aspect of the case.

13 So I do want to flag that. Because that's one that  
14 kind of sticks out. And, you know, it perhaps more -- will  
15 have a much more significant impact on witness lists,  
16 documents, et cetera.

17 MR. CROSS: Your Honor, this is David.

18 Respectfully Josh, I don't know what he is talking  
19 about. When he says they have tried, this is the first that  
20 I'm hearing of this. I mean, maybe a long time ago in  
21 discovery, there was a request made. I don't recall.

22 But we're on the cusp of trial. None of their  
23 experts have asked to do this. I don't know what they would do  
24 at this stage. Expert discovery closed a very long time ago.  
25 And this is very untimely.

1 MR. MILLER: Judge, this is Carey Miller. I don't  
2 have the docket number in front of me. But there is a  
3 discovery dispute filed on the access to this. And, frankly,  
4 it is not so much about our experts doing anything but we have  
5 got to be able to adequately cross-examine Dr. Halderman.

6 And, really, the reason this arose is that we noticed  
7 on the recent exhibit list that there was, you know, equipment  
8 to be coming in.

9 If they are not planning on doing that kind of  
10 demonstration, then maybe it is not an issue. But we read that  
11 to assume that that was the case.

12 THE COURT: Well, is that the case, Mr. Cross?

13 MR. CROSS: Are we planning to -- we had talked about  
14 a demonstration. I have not had a chance to connect with  
15 Dr. Halderman to determine whether we would actually do that.

16 I honestly don't know the answer to that. I would  
17 have to talk to him and figure out whether we would.

18 I mean, Your Honor may recall. We have videos that  
19 we used last time. It may be that we just use those videos  
20 again for demonstrative purposes for the Court to see what he's  
21 talking about. That may be fine.

22 I just have not had time to focus on this, so I don't  
23 know. But I guess what I come back to is: This is all  
24 something that should have played out a long time ago. You  
25 don't get to sit on this until we are three weeks out or

1 whatever we are -- six weeks out from trial and suddenly say,  
2 we want to do expert discovery.

3 THE COURT: Okay. Well, I don't -- I don't have the  
4 request or the response or anything about it. So I think you  
5 all need to send me everything you have about it so that I can  
6 have it by tomorrow.

7 MR. MILLER: Judge, if I may, this is Carey Miller.  
8 I have just located the discovery dispute filing. It is  
9 Docket 1246.

10 THE COURT: Okay.

11 MR. CROSS: I'm sorry. What was the resolution?

12 MR. MILLER: Yeah. Honestly, David, I'm not sure  
13 that there was a resolution. This was January 6th of 2022.

14 THE COURT: January 26 of '22?

15 MR. MILLER: January 6 of '22.

16 THE COURT: We're just trying to have an anniversary.  
17 Okay. All right.

18 MR. CROSS: I think I once read that this case is  
19 like Groundhog Day.

20 THE COURT: Yes. We have a new Groundhog Day  
21 apparently.

22 All right. Well, I obviously can look at that. But  
23 if both parties could look at your own -- what you think you --  
24 whether there was any follow-up or not, it still would be  
25 helpful because I would like to try to resolve that and address

1 it as soon as possible and I'm -- this week.

2 So anything you can -- your staff can find so that I  
3 can have it by 2:00 tomorrow, it would be most helpful.

4 MR. BELINFANTE: We can do that, Your Honor. Sorry.  
5 Josh Belinfante.

6 THE COURT: But in terms of the -- even if the State  
7 wants to proceed with other -- a motion in limine, I'm still  
8 concerned about the time frame. I had put down the first date  
9 as December 11th, and I just think that is not going to give us  
10 enough time.

11 MR. MILLER: Judge, this is Carey Miller. I don't  
12 necessarily disagree there, Your Honor.

13 THE COURT: Well, I know you're just at this point  
14 sort of looking at what you need to do or don't need to do.  
15 And you can all talk about it. But I --

16 Do you have your calendar open?

17 LAW CLERK: Yes.

18 THE COURT: Well, do you think that the motion in  
19 limine could at least be filed by the 6th of December? Is that  
20 realistic? Or do you need the 7th? I understand this is a  
21 crunch and you-all have had a lot of trials.

22 MR. MILLER: Your Honor, we'll do whatever the Court  
23 needs to make it work. A bit of the struggle that we were  
24 having with respect to -- we did confer. But a bit of the  
25 struggle we were having with respect to the motions in limine

1 at that time was, you know, we weren't exactly sure what to be  
2 filing it off of without the summary judgment order.

3 THE COURT: Right. Okay. Well, let's get me -- if  
4 you are going to file a motion in limine, file it by the 7th of  
5 December. And I need a reply by the 12th. And then anything  
6 after that is sort of like -- in terms of a reply, you know, I  
7 would need the reply by the 14th.

8 So hopefully if you all confer some more about the  
9 issues that you wanted -- you're thinking about, you could  
10 perhaps limit that or structure it.

11 MR. MILLER: Okay.

12 THE COURT: And it may be that we're going to just  
13 respond by saying yea or nay on something and not be giving you  
14 much of a discussion and we'll discuss it later on, so...

15 MR. CROSS: This is David. Can I just ask one other  
16 thing for efficiency sake maybe?

17 THE COURT: Yes.

18 MR. CROSS: If it ends up that the State files  
19 motions in limine because we're not able to reach resolution,  
20 would Your Honor have time to just quickly peruse them and let  
21 us know whether we need to file -- it may be that you read them  
22 and we don't need to respond.

23 THE COURT: Well, we can do that. I have a trial  
24 that begins on the 6th though, you know. But that is a  
25 weeklong trial. But it doesn't mean I can't read it either.

1 But it depends.

2 I would just say these need to be not magnum opuses.

3 MR. MILLER: Your Honor, certainly the  
4 State's intention would be that any motions in limine are short  
5 and concise and, to the extent we can, simply consolidate  
6 issues within a single motion. Keep it within the 25-page for  
7 sure.

8 THE COURT: Okay. Thank you.

9 Okay. So the long and short of it is I would be  
10 prepared to make an assessment after I get the plaintiffs'  
11 response. I'll look at it if I can beforehand so that if I  
12 have something to say and say please address A and B but not C  
13 and D -- motion C and D are not necessary or vice versa, I will  
14 let you know.

15 MR. RUSSO: Good afternoon, Your Honor. This is  
16 Vincent Russo. I just joined. I have been in a TRO hearing.  
17 So I apologize. But I did want to identify myself so you  
18 didn't think it was someone random joining the meeting.

19 THE COURT: Mr. Russo, you're never random.

20 MR. RUSSO: I apologize again for being late.

21 THE COURT: No. I heard that you were in a TRO  
22 hearing.

23 What was the subject matter?

24 MR. RUSSO: It is over a licensing process in the  
25 state of Georgia related to medical cannabis.

1 THE COURT: Well, speaking of motions, just to jump  
2 off of what we were talking about, you know, there's a motion  
3 from somebody who is proceeding pro se to intervene.

4 I wanted to get your input as to whether you wish to  
5 respond to that or not.

6 MR. BROWN: Your Honor, this is Bruce Brown. I will  
7 be filing on behalf of the -- on behalf of CGG and Curling  
8 plaintiffs' agreement, that we are opposing the motion to  
9 intervene on timeliness grounds.

10 But I'm just about finished with that filing, and it  
11 will be filed right after this conference today.

12 THE COURT: Okay. Thank you. Anyone else planning  
13 to file a response?

14 MR. BELINFANTE: Your Honor, this is Josh Belinfante.  
15 Once we see Mr. Brown's response, we may just  
16 (unintelligible) --

17 THE COURT: You may just what?

18 MR. BELINFANTE: We may just file something that  
19 agrees. I don't think you will be getting anything significant  
20 from us.

21 THE COURT: Okay. Thank you.

22 Mr. Cross, did you have anything you wanted to offer  
23 in that regard?

24 MR. CROSS: No, Your Honor. We agree with Bruce.  
25 We're joining in the motion -- his opposition.

1 THE COURT: All right. Very good.

2 All right. Are all of the other -- is there anything  
3 as to the rest of the case events on the original scheduling  
4 order of the 13th of October -- is there anything else that you  
5 want to talk about in that connection? Anything that needs to  
6 be adjusted?

7 MS. KAISER: Your Honor, this is Mary Kaiser.

8 MR. TYSON: This is Bryan Tyson.

9 Oh, I'm sorry. Go ahead, Mary.

10 MS. KAISER: Thanks, Bryan.

11 We wanted to get Your Honor's clarification on one  
12 entry on that order. It is at the top of Page 3, the deadline  
13 that is Tuesday, December the 12th. It says, counsel should  
14 proceed to schedule a mutually acceptable date and time for a  
15 conference together for the purpose of working on a proposed  
16 pretrial order that shall be due no later than November 28th,  
17 2023.

18 So...

19 THE COURT: Yeah. I don't know why it said  
20 December 12th. I have no idea. I assume that it meant  
21 actually possibly November 11th, but I don't know.

22 I can remember going over this with my very smart  
23 clerk who was relatively new to the case by phone because of  
24 some emergency. So it is -- I think it must have been a  
25 telephone communication problem between the two of us.



1 I take responsibility for it though because it is  
2 obviously nonsense. So...

3 MR. TYSON: Your Honor, this is Bryan Tyson.

4 One thing I was actually going to ask -- we had  
5 talked about on our side is I know we have these kind of  
6 interstitial deadlines of, you know, joint witness list in  
7 pieces.

8 Would it make sense for you to kind of give us a date  
9 to file a consolidated pretrial order that includes all these  
10 pieces that are breaking up to get in separately and we'll just  
11 kind of work through that --

12 THE COURT: That would be great.

13 MR. TYSON: -- and then file the consolidated  
14 pretrial order?

15 THE COURT: That would be great.

16 MR. TYSON: What day would you want that pretrial  
17 order then?

18 THE COURT: What date is realistic for all of you?

19 MR. TYSON: We could use that December 12th deadline.  
20 But I know we have a motions in limine response deadline for  
21 the plaintiffs on that date now.

22 So is that enough time for the pretrial conference  
23 for you if the pretrial conference is the 15th?

24 THE COURT: I think so.

25 Well, what I would say is, if you could get it in on

1 Monday by -- by 6:00, it would be -- it would be better Monday  
2 the 11th.

3 MR. TYSON: Sorry. Get the consolidated pretrial  
4 order by Monday the 11th at 6:00 P.M. And then that would  
5 include all the different pieces. So there wouldn't be like a  
6 separate filing only December 4th with a joint list and things.  
7 That would just be encompassed with the CPO.

8 THE COURT: Right.

9 MS. KAISER: Your Honor, this is Mary Kaiser.

10 We did want to talk about the consolidated pretrial  
11 order and what does or does not need to be included. You know,  
12 we had tried to, I think, isolate what we thought would be of  
13 most benefit to the Court and the parties in terms of pretrial  
14 filings with, you know, witness lists, exhibit lists,  
15 deposition designations. Because I know there are a number of  
16 components that are called for in the local rules for the  
17 pretrial order. Some of which we don't think are necessary.

18 So we could talk through specifically what those are.  
19 I mean, I know there are several sections that pertain fully to  
20 jury trials, which I assume we would not need to address in our  
21 consolidated pretrial order.

22 THE COURT: Correct.

23 MS. KAISER: Okay. Then just given the Court's deep  
24 familiarity with the case, recent decision on summary judgment,  
25 and the fact that this is a bench trial, we believe that we

1 could properly dispense with some of the other sections, such  
2 as stipulated facts, the statement of legal issues to be tried.  
3 But we wanted to get Your Honor's thoughts on that.

4 MR. MILLER: Your Honor, this is -- oh --

5 MR. TYSON: Your Honor -- oh -- go ahead, Carey.

6 THE COURT: Let me hear from the State's counsel.

7 MR. MILLER: Your Honor, this is Carey Miller.

8 I think I had rather jump to the phone quicker. I  
9 heard about the legal issues to be tried being removed or  
10 avoided in the pretrial order. Frankly, the State disagrees on  
11 that. I think that would be helpful to all the parties  
12 involved with respect to the order, what all comes in and  
13 frankly may render our intended motions in limine unnecessary,  
14 at least to some extent.

15 And with respect, this is (unintelligible) not  
16 applicable. I agree some of those won't be applicable. That  
17 is how we have done it in prior cases at least.

18 THE COURT: I'm sorry. I didn't -- the last sentence  
19 you said something would not be askable?

20 MR. MILLER: Oh, I'm sorry. Not applicable.

21 THE COURT: Not applicable. Okay.

22 I think if you-all would schedule a phone conference  
23 as soon as possible to discuss any other details like that. I  
24 mean, it is fine to have the legal issues. I understand  
25 State's counsel's -- Mr. Miller's view. And that makes sense.

1 I just don't think you need to give -- for instance,  
2 usually we have a statement of what the case is about. Please  
3 don't do that. That is not necessary. And it is a very large  
4 list of counsel. You don't even have to do that. But it is  
5 easy for you to do also. I do want you to identify who is lead  
6 counsel.

7 But -- so if we're going to make it -- if we're going  
8 to -- I mean, it just seems to me that you could -- by having a  
9 phone conference -- a genuine working conference, you could  
10 possibly be making -- moving the blocks of this so that you  
11 were already no later than the date I gave you but it is --  
12 because you could possibly do it beforehand.

13 I don't know whether you've made progress in  
14 exchanging already or about to be ready with anything as to  
15 exhibit lists, et cetera.

16 So in short, is there something other than the  
17 objections to documents, document lists, witness lists, and the  
18 item that was -- I mean, I'm just thinking about what is  
19 usually in the pretrial order.

20 Any other issues that need to be addressed?

21 MR. CROSS: Regarding the pretrial order or just in  
22 general?

23 THE COURT: Regarding the pretrial order. But the  
24 pretrial order also asks you if there will be anything that  
25 will be helpful basically will be addressed.

1 MS. KAISER: Your Honor, this is Mary Kaiser.

2 MR. TYSON: Your Honor --

3 MS. KAISER: I think -- I'm sorry, Bryan. We keep  
4 talking over each other.

5 MR. TYSON: You can go ahead.

6 MS. KAISER: Thank you. This is Mary Kaiser.

7 I think one other issue we wanted to clarify is the  
8 proposed findings of fact and conclusions of law. I think that  
9 is typically required in a pretrial order for nonjury cases.  
10 That is something that could take considerable time to put  
11 together. So we wanted to see if that is something that Your  
12 Honor would like us to do.

13 THE COURT: I would prefer for you -- if we're going  
14 to -- if I'm going to ask you to do it, I would prefer it to  
15 occur after trial.

16 I don't think that most judges who have a bench trial  
17 have as much familiarity with the facts as I have here so -- or  
18 the evidence, let's say. They are not facts, but evidence and  
19 the conflicts in the evidence.

20 So I think we should be thinking about doing all of  
21 that after the trial.

22 MR. TYSON: Your Honor, this is Bryan Tyson.

23 I agree. I think it is helpful to have those after  
24 trial.

25 One other thing we had been trying to brainstorm

1 about ways to help kind of get us to the right points on  
2 things. I know Your Honor in the summary judgment order had  
3 given some points on Page 5 about kind of structure of  
4 potential remedial pieces of the puzzle.

5 And in light of the summary judgment order, one thing  
6 that we can talk about and might be helpful is in light of what  
7 the Court has ruled on summary judgment for the plaintiffs to  
8 clarify kind of what the scope of remedy is they are seeking in  
9 the trial. I think that might be helpful to help us kind of  
10 focus in on the issues and those types of things.

11 That was another thing we had discussed that might be  
12 useful, especially since the Court had kind of set a structure  
13 on the summary judgment order of here are some areas where that  
14 might be a useful conversation.

15 THE COURT: Does counsel for the plaintiffs want to  
16 respond to that?

17 MR. BROWN: This is Bruce Brown. I'm not sure we are  
18 ready to answer that question, frankly, during this  
19 conversation.

20 You know, the bulk of our case will be concerning the  
21 ballots, whether it is contemplated by the *Anderson-Burdick*  
22 line of cases showing we hope and believe to be the case that  
23 the BMD system as currently configured is unconstitutional.  
24 And then in terms of how the Court would decide to address  
25 that, including the time frame and the components of doing

1 that, that would be up to the Court. And we do not know right  
2 now, in fact, what that -- what evidence we would put up in  
3 that respect.

4 But our experts have, you know, covered this in  
5 depositions. And I know it has been covered in discovery.

6 But exactly what our trial presentation would be on  
7 that, we don't know at this time.

8 THE COURT: Okay. Well -- and anyone from the  
9 Curling folks?

10 MR. CROSS: Your Honor, this is David Cross.

11 I guess what I would say is, like, I generally agree  
12 with Bruce, you know, in terms of the scope of the relief we're  
13 looking for.

14 I mean, I will say candidly that the primary relief  
15 we're looking for is an order akin to what we got in August of  
16 2019. But there are certainly a lot of different iterations  
17 for relief that will be available to the Court, a lot of which  
18 we have talked about, as Bruce said, in discovery, which  
19 involve software changes, audits, physical security measures,  
20 again covered throughout.

21 And I think -- the way I'm thinking about it is we're  
22 going to put our evidence and our experts on. We're going to  
23 ask Your Honor to issue an order like you did in August of  
24 2019. And if Your Honor decides that that is not supported  
25 based on the record, then we're going to have options short of

1 that within the framework, frankly, that you've laid out in  
2 your decision that gets to things like the software package and  
3 the other measures.

4 But those are fallback measures in our mind. But  
5 they will be relief that is available at trial.

6 MR. TYSON: Your Honor, this is Bryan Tyson.

7 I guess one thing that we -- I don't know if it is  
8 helpful. In the Fair Fight trial along that line -- I hear  
9 what Bruce and David are saying -- before the close of the  
10 plaintiffs' evidence in the Fair Fight case, given the kind  
11 of -- you know, there is a variety of different remedial  
12 approaches, Judge Jones had the plaintiffs kind of do a  
13 presentation on remedies as part of that as like what they were  
14 seeking.

15 And in an election case, I think it is especially  
16 helpful just because of, as you know, the very fact intensive  
17 nature of running elections and all the interconnected pieces  
18 of it.

19 So we can keep thinking about that. But I just  
20 thought that since Your Honor has given us some framework on  
21 that front it would be helpful. I know that is similar to what  
22 we had kind of last discussed with Mr. Gonzalez in kind of  
23 making a proposal along those lines to the plaintiffs. So  
24 maybe there is room on that too.

25 THE COURT: Yeah. Well, I think it is a good idea



1 for the plaintiffs to be prepared to do it, to present  
2 something at trial at the end of their case or at the end of  
3 both parties' cases.

4 But, you know, of course, as you well know, I think  
5 it is important for you to continue discussing those very same  
6 issues now and not wait till trial.

7 So I think that is the best I can tell you.

8 MR. TYSON: Thank you, Your Honor.

9 And for the sake of the defendants, we are ready to  
10 hear from plaintiffs definitely. So we have that out there.  
11 We are ready to hear back from them on that, and hopefully that  
12 can get things moving.

13 THE COURT: Okay. So, you know, the discussion so  
14 far really just as sort of -- we've been focused on terms of  
15 the pretrial order about what is not necessary, what could be  
16 modified. And I think we have basically done that. We need a  
17 witness list and exhibit list, deposition designation. And we  
18 have talked about the motions in limine.

19 MR. MILLER: Your Honor, one thing with respect to  
20 the deposition designations that I just want to ask clarity  
21 from the Court on: The State would generally intend to, you  
22 know, oppose introduction of a deposition if they are within  
23 the scope to be commanded to be at trial, if it is just a  
24 general witness.

25 I just want to make sure that the Court was not

1 expecting from us to have deposition designations other than  
2 those who are unavailable.

3 THE COURT: I mean, I think it is for people who are  
4 unavailable is the way I considered it --

5 MR. MILLER: Okay.

6 THE COURT: -- unless there is some other issue that  
7 I don't know about.

8 MR. MILLER: No, Your Honor. That resolves my  
9 question. I had the unfortunate scenario of being in a case  
10 where it was much broader than that.

11 So thank you for that clarification.

12 MR. CROSS: Your Honor, the one caveat I would offer  
13 to that is under Rule 32 for managing agents. For example,  
14 Rule 30(b)(6) testimony of the State, the witness does not have  
15 to be unavailable. So I generally agree with what he is saying  
16 except if it is within the scope of Rule 32. It would be  
17 unavailable witnesses.

18 MR. MILLER: That Rule will significantly narrow down  
19 the list, and we can handle the objections with the exchange.

20 THE COURT: All right. Why don't you indicate the  
21 possible managing agents. So if there is a problem in having  
22 them present, then we can -- it can be dealt with in advance.

23 MR. CROSS: Yes, Your Honor, we will do that.

24 The other thing we would suggest -- and we haven't  
25 raised this with the Court. So if you want to think about it.

1 But generally I found that if both sides agree that  
2 they will put their clients on without subpoenas I think that  
3 makes things easier for everyone.

4 THE COURT: I agree. But I think -- I think --

5 MR. TYSON: Yeah. This is Bryan Tyson. We're fine  
6 with that.

7 THE COURT: Okay.

8 MR. BELINFANTE: Your Honor, this is Josh Belinfante.

9 The only caveat I want to add is the Governor himself  
10 is on the witness list. So I think that is one at least we  
11 would object to and perhaps the Secretary. We have certainly  
12 had apex issues in the past. And that gets to part of our  
13 pretrial motions as well. So we will raise that. I wanted to  
14 not surprise the Court if there is dispute about that.

15 THE COURT: Well, I missed a word here. You said  
16 about the Secretary there are apex issues. And I don't know  
17 what -- I don't know what the apex issues are. What --

18 MR. BELINFANTE: Sure. I think the Secretary -- and  
19 this was Judge Jones' ruling in Fair Fight on the Secretary as  
20 well.

21 But issues involving the Secretary can be handled by  
22 staff members who we do plan to put up without any objection.  
23 And under apex, that would be the appropriate, we think, way to  
24 handle his testimony and the Governor as well. And technically  
25 our representation is not of the Governor. So we would have

1 some issues that we would have to work through on our side on  
2 that.

3 But I just -- again, I just wanted to flag it so that  
4 the Court is not surprised when you see something.

5 THE COURT: All right.

6 I would appreciate if you would discuss that with the  
7 parties together. So if you're talking about replacing the  
8 Governor -- well, let's talk about the Secretary of State  
9 first -- the Secretary of State with somebody else that it is  
10 somebody who actually -- in the 30(b)(6), it is somebody who  
11 actually is prepared and fully equipped to answer the  
12 questions.

13 MR. MILLER: Yes, Your Honor. This is Carey Miller.

14 That is certainly the intent. And that is actually  
15 kind of an initial question I think when we first exchanged  
16 exhibit lists because we had listed out, you know, basically  
17 the various folks within the Secretary's office that we knew  
18 were likely to be within the scope and also tried to leave a  
19 placeholder to say, to the extent these aren't the right  
20 people, it will be a representative of the Secretary's office  
21 on the topic.

22 Of course, again, that exchange occurred prior to the  
23 summary judgment order. So --

24 THE COURT: Okay.

25 MR. MILLER: -- maybe we can narrow that down

1 further. But that is certainly the intent, Your Honor.

2 THE COURT: Do you all have --

3 MS. KAISER: Your Honor, this is Mary --

4 THE COURT: Go ahead.

5 MS. KAISER: Your Honor, this is Mary Kaiser.

6 I think since we are talking about witnesses, we did  
7 want to raise a couple of issues that we had been discussing  
8 with the State about their witness list because the list that  
9 they produced to us so far has failed to identify any will call  
10 witnesses versus may call. It is just one list that doesn't  
11 distinguish between witnesses they definitely intend to call  
12 versus those they may call.

13 And to Mr. Miller's point, they included placeholders  
14 for representatives but not only from the Secretary of State's  
15 Office but also from several other entities, including  
16 Dominion, the Coalition, and the Coffee County Elections Board.

17 And we think that we are close enough to trial here  
18 that they should be able to identify specific individuals to  
19 move into place rather than just a placeholder for  
20 representatives.

21 So we would ask that they amend their witness list to  
22 identify will call witnesses and to specific individuals from  
23 those entities. We have reached out several times and asked  
24 them to make those changes and have not received a response  
25 yet.

1 MR. MILLER: Your Honor, this is Carey Miller.

2 I think the discussion earlier with respect to the  
3 remedy kind of goes to this issue as well. You know -- and  
4 particularly at the time that we exchanged these witness lists,  
5 we did not know what the scope of trial was going to be while  
6 our summary judgment motions were pending.

7 But at this point, the, you know, appropriate witness  
8 to respond to a question on audits is probably going to be a  
9 different witness than the appropriate witness to respond to a  
10 question on the Secretary's ballot-building process. So that  
11 is kind of a starting point where we were struggling.

12 With respect to the Coffee County Board designee, we  
13 put that placeholder in there because, as we understood, the  
14 30(b)(6) witness that was deposed is no longer on the board.  
15 So really it would be, I think -- I would have to get out my  
16 mileage calculator to see where Coffee County is. But it may  
17 be that that is obviated by the deposition testimony.

18 So a lot of this has been a little bit of a -- we're  
19 trying to reserve our rights to be able to adequately respond  
20 to the plaintiffs' presentation of their case without, until  
21 last Friday, knowing what case we were going to trial on.

22 And I do think to the extent that we can have this  
23 discussion on what remedy is on the table, frankly, that  
24 probably allows us to narrow it down significantly further.

25 THE COURT: Okay. Well, I understand that. And at

1 the same time, I think that you -- there are individuals you  
2 know are core will calls. Everyone is always very anxious  
3 about putting people on a will call list because you don't know  
4 what exactly is going to happen.

5 But inevitably there will have to be some core  
6 people, no matter who, who are on will call. And as to people  
7 who are on may call, of course, I will say to the plaintiffs if  
8 there's something -- one that you really think that you are  
9 going to all need, you obviously should be putting the State's  
10 witnesses on your own list.

11 MS. KAISER: Your Honor, would it be possible to get  
12 a date by which the defendants will update their witness list  
13 to identify the will call witnesses and particular  
14 representatives?

15 MR. BELINFANTE: Your Honor, this is Josh Belinfante.

16 I think, again, to Mr. Miller's point, we're happy to  
17 work with a date if we know what the remedy is the plaintiffs  
18 are seeking. It is completely amorphous. The Court has  
19 identified several things that could be a remedy. We're open  
20 to talking about those. We have been.

21 But it is very difficult for us to identify who is  
22 going to come in if we don't know what this case and the remedy  
23 is.

24 MR. CROSS: Your Honor, this is David Cross.

25 That is not how trials work. I have been in many

1 trials with injunctive relief. In antitrust cases, for  
2 example, injunctive relief is often on the table. I've done it  
3 on both sides, plaintiff and defendant. You don't know until  
4 you are in that courtroom what the scope of the relief is going  
5 to be and the various iterations it could be.

6 In antitrust trials, for example, oftentimes the  
7 plaintiff, sort of their ideal injunctive relief is to say that  
8 defendant has to stop what it is doing and that then can break  
9 down where a judge says, okay, I'm not going to give you a  
10 complete bar on what they are doing, but there are a lot of  
11 different things I can do short of that to tell this company  
12 they can't do this, that, or the other thing.

13 And there is no obligation ever to have to say, here  
14 is every iteration that anybody might contemplate that a judge  
15 might come up with. That is not how trials work. They know  
16 what their core defenses are. They know who some of the  
17 witnesses are that they are going to rely on.

18 And it is not going to turn on anything that they are  
19 hearing that they have already heard. There is nothing our  
20 experts are going to say in this courtroom on any opinions they  
21 offer that they haven't heard before. So we --

22 THE COURT: Well, let me just say --

23 MR. CROSS: -- we need to get --

24 **(Unintelligible cross-talk)**

25 THE COURT: I don't -- I think that -- I'm not quite



1     sure why the remedy is being attached so much to the question  
2     of what witnesses are will call or may call. But I think what  
3     you've got to do is the people that you know you're going to  
4     have to call -- the State has to call or that the plaintiffs  
5     have to call they should -- there is no question you're going  
6     to call them, that you should honestly put them on will call.  
7     And you put the others on may call.

8             And that is -- I mean, I'm not going to say more than  
9     that. I mean, it is obvious that I am seeking -- you know,  
10    have a different -- a more limited vista on remedy than  
11    probably the plaintiffs have.

12            But it doesn't mean that that is -- it doesn't really  
13    change things because I'm not -- I may be awarding no remedy  
14    also. I may be finding that there is -- that while you had  
15    enough to go forward with a trial that you don't have enough  
16    basis to prevail in the case.

17            So, you know, I think that we're talking about a zero  
18    to 100 percent, and everyone is going to have to just figure  
19    out in between. And I mean this for both the State as well as  
20    for the plaintiffs.

21            But honestly try to figure out who -- I think an  
22    important thing is to try to identify though, as realistically  
23    as possible, who is a will call witness. And if we only end up  
24    having a tiny number of people who are will call when everyone  
25    knows they really are going to be likely called, you know, that

1 is not really being constructive in terms of running -- having  
2 the trial.

3 But I'm not sure, frankly, under the circumstances  
4 where I'm also asking you to work with Mr. Gonzalez why we're  
5 exactly in this spot because you're going to do a may call  
6 and -- ultimately all of you a may call and will call as you  
7 see fit but trying to be as fair as possible in identifying  
8 what you know are real witnesses and the same thing as to the  
9 remedy issues.

10 You're going to be -- you know, I'm certainly hoping  
11 that you're going to be continuing to talk and you're going to  
12 get some sense from that.

13 So I don't know why we have to have a special -- a  
14 special session on that since I've already asked for it  
15 essentially for you to continue talking about that.

16 So that's as much as I can say. So I really haven't  
17 positively and affirmatively responded to either side about  
18 this, in short. Do your best and keep on talking.

19 MR. BELINFANTE: This is Josh Belinfante. I think  
20 certainly that is fair, and we appreciate it. But we don't  
21 know is are the -- even in light of your order, are the  
22 plaintiffs going to come in and seek hand-marked paper ballots?

23 And, again, that changes a lot of, you know, what  
24 is -- because the defense to hand-marked ballots is quite  
25 different from the defense to updating software. And so yes,

1 we will -- we can assure you -- and I'm saying it fully on the  
2 record. We will try to provide a definitive list of people we  
3 fully intend to call regardless.

4 But that has been part of the issue, and it goes to  
5 the remedy. Yes, I have been in cases too where we have pushed  
6 people on remedies. The courts have agreed that part of the  
7 standard is determining whether the remedy the person seeks is,  
8 you know, comparatively better, warranted by the evidence, and  
9 so on.

10 And, you know, we have been at this since 2016, 2017.  
11 It is time for them to know what they want, particularly in  
12 light of the order.

13 MR. BROWN: Your Honor, this is Bruce Brown.

14 I would like to respond to Mr. Belinfante.

15 THE COURT: All right.

16 MR. BROWN: The remedy that we seek is no secret, and  
17 that is a prohibitory injunction on the BMDs. The defendants  
18 need to bring the witnesses that they believe can persuade the  
19 Court that that relief is unnecessary because other relief will  
20 fix the problem or is not authorized under the law.

21 So, Mr. Belinfante, that is your answer.

22 MR. BELINFANTE: Well, respectfully, Mr. Brown, if  
23 you get rid of the BMDs, what is your alternative? And that is  
24 part of the calculus in what is required for an injunction.  
25 So...

1 MR. BROWN: Then that is up to you to litigate. That  
2 is not a pretrial issue.

3 And, Judge, they are trying to put us on the spot by  
4 surfacing settlement discussions in the middle of a pretrial  
5 conference, which is totally not going to work. I'm not going  
6 to say it is inappropriate. It is just not going to work.

7 MR. BELINFANTE: In the press -- so I really am not  
8 going to feel terrible about what you are saying. I'm not  
9 talking about settlement conferences. I'm asking you to  
10 explain if the BMDs are enjoined -- and we don't think they  
11 will be and should be based on the evidence -- what is the  
12 remedy you're seeking. Because that is part of the calculus  
13 and the elements. And, you know, that's not --

14 **(Unintelligible cross-talk)**

15 MR. CROSS: That is not how this works. We went  
16 through this. This trial is similar to the preliminary  
17 injunction hearing we did in 2019. The Court issued a negative  
18 prohibitory injunction. The Court did not tell the State what  
19 to adopt. We are not telling the State what to adopt. And  
20 that is how injunctions work.

21 Our only obligation is to establish that the current  
22 system does not meet the constitutional requirements. If we  
23 prevail on that -- maybe we will; maybe we won't. But if we do  
24 and we persuade the Court, the Court can issue the same sort of  
25 injunction it did in August of 2019.

1           The fallback is then up to the State, just as it was  
2     in August of 2019. This is a red herring, and I agree with  
3     Bruce. This is -- this is -- it does not overt and it is not  
4     an appropriate topic for today.

5           MR. BELINFANTE: If it is y'all's position that you  
6     don't know, won't admit, or won't say what your remedy is,  
7     fine, we'll adjust to that. Just come out and say it.

8           MR. BROWN: I just told you that we did know what our  
9     remedy was. You don't like it. But I told you what it was.

10          And it is just -- for example, if this were an Eighth  
11     Amendment prison case where we were challenging the conditions  
12     of confinement, our burden would be to show that the prison  
13     conditions were unconstitutional. It would be up to the Court  
14     to fashion an appropriate remedy.

15          And the extent of the Court's power in terms of what  
16     it could order the State to do or not do about building  
17     prisons, prisoners in other prisons, having a bond issue, that  
18     is a difficult issue that Judge Totenberg has recognized in her  
19     order.

20          But our burden is to show that it is  
21     unconstitutional. And if the State wants to bring in witnesses  
22     to show that it is not or that our -- that they have no  
23     alternative but to roll out unconstitutional BMDs, then bring  
24     it on.

25          MR. BELINFANTE: Well, Your Honor, I mean, you've

1 heard and I've heard what we need to do. Our difficulty in  
2 trying to understand the plaintiffs continues. They won't tell  
3 you, us, or anyone really what remedy it is they are seeking.

4 That is (unintelligible) element, but that is where  
5 we are.

6 THE COURT: Well, let me just say that I think that  
7 they -- we all have known each other and had these  
8 conversations a lot. But I think what perhaps is different --  
9 a little different is, of course, in some prior hearings there  
10 have been explicit requests for paper ballots.

11 At this juncture, they are basically not saying that.  
12 What they are saying, perhaps to make me happy -- I don't know,  
13 but also perhaps because it is absolutely 100 percent  
14 correct -- is that the most that the Court can do relative to  
15 the question of -- the very most the Court can do as to  
16 remedial relief in terms of determining what a remedy is in the  
17 legislative scheme is one that they actually cannot ask me to  
18 impose on, other than at most to not proceed with the current  
19 system as implemented right this moment.

20 So, you know, I don't think you -- the fact that they  
21 are not going -- are saying they are not prepared to present  
22 evidence on as they have in the past or at least some of them  
23 have in the past about a different system of voting is probably  
24 influenced by what the decisions have been and what the limits  
25 of the scope of my authority are. And so they have reverted to

1 what happened in 2019 instead.

2 So I don't -- I don't think you can ask them to  
3 propose a remedy that they know is outside my authority.

4 MR. CROSS: Your Honor, this is David.

5 One other thing I would add is I think Mr. Belinfante  
6 is confusing types of remedies because there are compulsory  
7 injunctions and there are prohibitory injunctions. Right?  
8 Compulsory injunctions would be us asking Your Honor to tell  
9 them to do something specific, affirmative steps, adopt the  
10 hand-marked paper ballots after 2018, for example.

11 What we're saying is we're asking for a prohibitory  
12 injunction. That is a remedy. And I'm not sure why there  
13 would be any disagreement on that. That is a -- many are  
14 issued in courts across the country probably on a weekly basis.

15 And a prohibitory injunction does not require  
16 anything other as a remedy than a court telling the defendant,  
17 stop what you are doing. And then the defendant has to figure  
18 out, well, what do I do instead?

19 And that is -- that is the extent of what is required  
20 by us. So I'm not sure why there would be any confusion on  
21 that.

22 MR. BELINFANTE: Your Honor, this is Josh Belinfante.  
23 I'll say this, and it sounds like we need to move on.

24 THE COURT: Okay. Thank you.

25 MR. BELINFANTE: I don't think it is on our side as

1 much as I think their own witnesses have testified that the  
2 remedies -- some remedies won't satisfy them. And I think to  
3 show irreparable harm to warrant that injunction, they are  
4 going to have to talk about what the remedy is. But they  
5 disagree. And so, you know, we'll address that at the  
6 appropriate time.

7 But I think we've probably covered enough ground on  
8 this one, Your Honor. So I'll --

9 THE COURT: Thank you.

10 MR. BELINFANTE: -- stand down.

11 THE COURT: All right. Thank you.

12 MR. CROSS: Your Honor, two other things we were  
13 going to touch on, but I don't know if there were more on the  
14 pretrial.

15 THE COURT: No, I don't have anything else.

16 MR. CROSS: Mary, did we have anything else on the  
17 pretrial?

18 MS. KAISER: No. We had a couple of logistical  
19 issues, but nothing else on the pretrial order.

20 MR. CROSS: Okay. The last two things, Your Honor:  
21 One, coming back to the expert issue, we have taken a look at  
22 the filing you were talking about. There was a January 31st,  
23 2022, hearing transcript -- and if you don't have it handy,  
24 we'll send it to the Court -- where Your Honor addressed that  
25 filing. And at Page 37, you directed the State to send us a



1 process and protective order for how they would propose  
2 handling the inspection of Dr. Halderman's work, including the  
3 malware.

4 Unless I'm mistaken -- and they can forward it to  
5 me -- I don't believe we ever received anything like that. I  
6 don't recall hearing from them after that conference.

7 So I would just reiterate our timeliness argument.  
8 But I'm happy to see if there is something they sent us as a  
9 proposal.

10 The other thing I was going to come to is settlement.  
11 I think there is one thing that would be helpful from us. We  
12 are talking with Carlos. I know the Coalition plaintiffs --  
13 all the plaintiffs are talking to Carlos.

14 It sounds like Carlos has had at least one  
15 conversation with Bryan and maybe others on the defense side.

16 We have been down this road before. And the  
17 challenge we have, Your Honor, is on the heels of your decision  
18 on Friday, the official position of the State through their  
19 spokesperson was -- and I quote -- we will not negotiate with  
20 election deniers.

21 I can't bring my clients to the table when that is  
22 the posture of the other side. If they are not going to  
23 negotiate, that's fine. But it means we don't move forward in  
24 settlement talks.

25 And when they publicly make those types of defamatory

1 statements, it is almost impossible to get our clients to  
2 engage, understandably, because then they are fighting for  
3 their reputations and so are our experts.

4 And so I'm not sure -- I'm not going to ask Your  
5 Honor for a gag order. But settlement -- and we have talked to  
6 Carlos about this.

7 It is just those statements are so knowingly false  
8 and defamatory about our experts, frankly, as Your Honor knows  
9 and I think --

10 THE COURT: All right. I got what you are saying.  
11 But, listen, I really --

12 MR. BROWN: Your Honor?

13 THE COURT: I think that that is something  
14 appropriate for you to deal with Carlos about. I am not --  
15 obviously I'm not in a position and there is no warrant for me  
16 to step that far.

17 I mean, all of the discussions of gag orders --  
18 everyone knows the context of that but I am -- in other cases.  
19 But I understand completely your concerns, and I think they are  
20 serious concerns. And, you know, I would -- I hope that  
21 counsel will try -- for the State will try to address those.

22 I realize this -- all of this creates lots of hot  
23 feelings. But really I have, you know, designated someone to  
24 deal with that. And I am trying -- I don't want to be involved  
25 further than just saying I think it could -- that there are

1 ways of addressing that.

2 And I'm hoping that counsel who have a lot of  
3 credibility with their client, as plaintiffs' counsel have a  
4 lot of credibility with your clients, we can handle this  
5 better. But I think it is a mistake for me to go further than  
6 that -- saying anything as to that.

7 MR. TYSON: Your Honor, this is Bryan Tyson.

8 I just want to also make really clear, like, our  
9 clients have put a proposal on the table that was not responded  
10 to last. And Mr. Cross is the one who in the press said he  
11 hopes the decision will be a wake-up call to the Secretary to  
12 secure the right to vote in Georgia.

13 So I think everybody toning things down would be  
14 helpful. But what would be most helpful is if the plaintiffs  
15 could respond to the proposal we made that kind of matches up  
16 with Page 5 of what you talked about in your order.

17 MR. CROSS: Bryan, that is not what I said. Come on.  
18 I said wake up --

19 MR. TYSON: I'm reading a quote from the article,  
20 David.

21 THE COURT: All right. This is really -- I'm not  
22 going to get involved with this, I'm just going to say. If you  
23 need to talk about it with somebody -- if you-all need to talk  
24 about it, then do it collectively with Mr. Gonzalez. But I am  
25 not going to say more.

1 I mean, I think that the process before ended too  
2 soon in my mind, and I'm hoping that you can bring some fresh  
3 energy to it and that people will not be making comments one  
4 way or the other about each other and their positions because  
5 it is the only way you're going to get there. But I think that  
6 is all I can say.

7 But what about -- I do want to circle back to the  
8 question: Does the State have any record or can you look in  
9 the next day of whether you have any record of your response to  
10 the email or entry of January 31st that I gave directing the  
11 State to send a potential protective order regarding the  
12 handling of the malware and other matters?

13 MR. MILLER: Your Honor, we'll --

14 MR. TYSON: Go ahead.

15 MR. MILLER: That really only came up when we saw the  
16 exhibit entry on the exhibit list.

17 THE COURT: Say that again. I'm not sure I quite  
18 caught what you said.

19 MR. MILLER: I said -- I apologize. We'll certainly  
20 look for it. And I apologize I didn't have it beforehand. We  
21 really only started thinking about this issue at the time that  
22 the exhibit list came up showing that on there. So I apologize  
23 for that.

24 THE COURT: All right. Well, whatever. Let's -- if  
25 you are going to want it, then you've got to basically move on

1 it tomorrow and get them your -- by the end of the day,  
2 whatever you actually either intended to send or that you  
3 actually did send.

4 MR. MILLER: Okay. Yes, Your Honor.

5 THE COURT: And then you can all talk about it. Then  
6 if you can't resolve that, then let me know. And if we all  
7 need to talk about it because of the shortage of time, you need  
8 to let me know by noon on Friday that you haven't been able to  
9 make sense of it -- of how to proceed.

10 So I know that is a lot. But I mean, either it is  
11 there or it is not there. And if it is not there, then you  
12 have all of tomorrow to figure out what you are going to be  
13 proposing to send it by 5:00 in the afternoon and see if you  
14 can resolve it in the morning if you can't agree and let me  
15 know by noon on Friday.

16 Is there anything else that would be helpful to  
17 address?

18 MR. BROWN: Your Honor, this is Bruce Brown. And I  
19 wish this conference were in person because then I could convey  
20 to you more fully how difficult this is a question to raise  
21 again.

22 But it is on the motion for fees. And we understand  
23 fully how hard the Court and its staff has been working on the  
24 motion for summary judgment and indeed for the last seven  
25 years. We, all of us, the Curling plaintiffs, Morrison

1 Foerster -- the associates and partners of Morrison Foerster,  
2 Krevolin & Horst, Cary's practice, my practice, Mr. McGuire,  
3 and my client, Coalition for Good Governance, just really urge  
4 upon you and just stress how necessary it is for us to get an  
5 order on the attorneys' fees motion for the DRE case.

6 We have been litigating this case now for seven years  
7 without any fees from the State. And a petition has been filed  
8 for some time, and it just is becoming both on a personal and a  
9 professional level more and more difficult to continue without  
10 that award.

11 In addition --

12 THE COURT: Let me ask you this -- let me just say  
13 this. Obviously I switched finishing off the fee motion for  
14 dealing with the -- because of the time the summary judgment  
15 motion.

16 But the reality is you know that even if I were to  
17 make -- issue an opinion and awarded you fees there is nothing  
18 that makes me -- is there anything that you see that is likely  
19 to result because of that in the payment of fees in the  
20 reasonable future, given the realities of litigation and the  
21 way that people appeal?

22 MR. BROWN: That is an excellent point, Your Honor.  
23 Several responses to that. First, the sooner we get started on  
24 that process the better.

25 Second is that it will have -- in terms of the

1 staffing and in terms of our own budgeting in terms of our  
2 funds or our practices and of getting donations and getting  
3 support, it will have a very meaningful impact upon our current  
4 financial position to have a projection for a fee awarded in  
5 the future.

6 And third, Your Honor, the -- I have been in several  
7 of these. And in some situations, the State will pay the award  
8 or even negotiate -- negotiate a resolution. In others, they  
9 will appeal it. And at least in my experience, they always pay  
10 for the fees in appealing it also. But that is not always the  
11 case.

12 Finally, if we're going to resolve the case as  
13 Mr. Belinfante is repeatedly raising, we need to resolve all  
14 the issues. And the fees for the BMD case and the fees for the  
15 DRE case are a material component of any resolution. And the  
16 State doesn't take the fee seriously because they don't see it.  
17 They don't see the bite of an attorneys' fees award as being  
18 much of an incentive for them to settle the BMD case, which is  
19 a major reason why they should come to terms with an  
20 appropriate resolution of the BMD case because it is a very  
21 expensive case that they will pay for.

22 But on the DRE phase of the case, that piece is fully  
23 litigated. Nothing is going to happen in the future to change  
24 either our entitlement to or the amount of that award. And so  
25 it really would have a meaningful impact upon Morrison Foerster

1 and the people there and upon our practices to start the  
2 process of collecting the fee award on the DRE case.

3 Thank you for hearing us out on that, Your Honor.

4 THE COURT: Okay. All right. Is there anything else  
5 that anyone wants to raise that is a new item?

6 MS. KAISER: Your Honor, this is Mary Kaiser, again.

7 There were just a couple of logistical issues that we  
8 wanted to raise today. The first is the pretrial conference.  
9 I think you set a date of December 15th. But we wanted to see  
10 if it made sense to set a particular time.

11 THE COURT: 10:30 in the morning.

12 MS. KAISER: Thank you, Your Honor.

13 One other issue we wanted to discuss is the paper  
14 exhibits. We know the Court has paper copies of many documents  
15 in this case. But, you know, we intend to provide trial marked  
16 copies of the exhibits. And we wanted to see how many copies  
17 of trial exhibits the Court would prefer.

18 THE COURT: I have two law clerks now working on the  
19 case, and then there is me, and then there is also the document  
20 for the record. And then, you know, all of that gets scanned,  
21 and we don't -- I know the clerk's office no longer keeps  
22 ultimately the paper record that is given -- put into the  
23 record.

24 But you can talk -- I think that you can talk  
25 ultimately with Mr. Martin about the question of scanning of



1 the documents -- the exhibits.

2 MS. KAISER: Okay.

3 THE COURT: But other than putting it -- putting in  
4 the document that is part of the record or that might be in --  
5 just simply in a scanned version, we need three.

6 MS. KAISER: Okay. Thank you, Your Honor.

7 THE COURT: If you have a witness, you need one for  
8 your witness -- for the witness.

9 MS. KAISER: Yes.

10 THE COURT: Anything else logistical?

11 MS. KAISER: Yes.

12 One other thing. We wanted to see if we could get  
13 access to an attorney lounge or witness room in the courthouse.

14 THE COURT: You'll be given one. You'll be given  
15 access to one.

16 MS. KAISER: Okay. Would it be helpful for us to  
17 coordinate --

18 THE COURT: Talk with Mr. Martin about that. He is  
19 the master of all logistics.

20 If you're planning -- if you're planning any fancy  
21 technology that you haven't gone over with him recently, then  
22 make sure that you get -- schedule a time for your folks to go  
23 over technology in the courtroom with him and with anyone else  
24 from the court staff who is involved in the technology.

25 MS. KAISER: Thank you, Your Honor.

1           Then in terms of the trial days, you know, we know  
2           that your standing order for jury trials calls for trial dates  
3           from 9:30 to 5:00 with a 15-minute break in the morning and the  
4           afternoon and a short lunch break. And we just wanted to  
5           confirm that we should expect the same since this is a bench  
6           trial.

7           THE COURT: Roughly speaking. But it is not -- I'm  
8           not having to keep a jury happy. So, you know, we might adjust  
9           that to go later. We might -- you know, things happen. I  
10          don't know how long you are thinking the trial is going to go.  
11          So it kind of depends on how long the trial is going in terms  
12          of managing that.

13          Do you have a projection of how many days the  
14          plaintiffs' case will go?

15          MR. CROSS: This is David. We've been thinking --  
16          oh, go ahead, Mary.

17          MS. KAISER: Go ahead, David.

18          MR. CROSS: I was just going to say we have been  
19          thinking the whole trial will run probably about two weeks, no  
20          more than three. Hopefully two. That gives Your Honor some  
21          sense.

22          I don't have it -- I don't know if Bruce does either  
23          -- sort of broken down by trial days. But if we're doing full  
24          days with reasonable breaks, two weeks is probably doable.

25          THE COURT: You are saying two weeks including the

1 State's portion or two weeks for you to present your portion?

2 MR. CROSS: The whole -- yeah. Sorry. Fair  
3 question.

4 The whole trial. So that would include us and the  
5 State. Unless the State is contemplating something longer than  
6 we were expecting, I think something like two, two and a half  
7 weeks would be feasible for the whole thing.

8 MR. BROWN: Yes, Your Honor. This is Bruce Brown.

9 Our thinking in terms of planning our witnesses is  
10 that while we may, you know, come short of actually leaving the  
11 Court to enter findings of fact under -- what is it? -- 56(g)  
12 or (h) -- I can't remember on this -- on the summary judgment  
13 record, it is certainly the Court's understanding of the issues  
14 and the depth of the documentary evidence already in the case  
15 to go ahead and accelerate the trial and we'll move it along.

16 THE COURT: Does the two, two and a half weeks sound  
17 realistic to the State's counsel?

18 MR. MILLER: Your Honor, this is Carey Miller.

19 And I'll say that I'm skeptical. That is largely in  
20 light of not anything to do with this case in particular. But  
21 I think when we were headed into the Fair Fight trial we were  
22 expecting three weeks and it ended up being six weeks with a  
23 month break and then another two or three weeks. As the Court  
24 well knows, it just goes a little slower in practice than you  
25 expect.

1           The only thing that would really complicate from the  
2     State's perspective -- we don't anticipate having a voluminous  
3     number of witnesses called. But to the extent the plaintiffs  
4     are not called in their portion of the case, we will be calling  
5     them.

6           MR. CROSS: The plaintiffs will testify. We have an  
7     understanding that they need to testify.

8           I assume, Your Honor, we're going to have a one up,  
9     one down rule with witnesses or called just once. We're not  
10    recalling witnesses in like the plaintiffs' case and the  
11    defense case.

12          MR. MILLER: Your Honor, from the  
13    State's perspective, I think we may have some difficulty with  
14    that. Maybe there are certain witnesses we can do it. But I  
15    understand the practical reality and, you know, how that played  
16    in with a preliminary injunction.

17          But as to a trial on the merits, the State will  
18    certainly intend to call their own witnesses in their own case.

19          MR. CROSS: I have not had a trial where a judge  
20    allowed that, but we defer to you, Your Honor.

21          THE COURT: Okay. Well, I don't have to decide that  
22    right now. Normally I allow people to call their own witnesses  
23    in their own part of the case. But that doesn't mean you can't  
24    call the plaintiffs or the defendants can't call the opposing  
25    party for cross-examination -- as a witness for

1 cross-examination but not for double cross-examination.

2 So, you know, that's -- you-all, I think, will work  
3 that out in time.

4 All right. Well, we're blocking off the two and a  
5 half weeks. But I'm not blocking off a month at this point  
6 because I just can't conceive of it. But I will -- obviously  
7 we are going to do what is necessary.

8 I do not see myself as us taking a month off in  
9 between because I have other trials to do. So I've just got to  
10 keep on rolling. But we'll see.

11 MR. CROSS: Your Honor, we haven't discussed this  
12 with the State, and we can come back to you with a proposal.  
13 But one thing that I have found in other trials is having a  
14 Court-imposed time limit discussed with the parties.

15 I agree with Carey that things sometimes balloon.  
16 But in my more recent trials, the judges have told us you have  
17 so many hours and that is it. And it is amazing how efficient  
18 people can be when the judge tells you --

19 **(Unintelligible cross-talk)**

20 THE COURT: I agree. I agree. I agree. But let me  
21 get you a little closer to being -- planning your case. And  
22 everyone can get very long-winded in this case, I realize. But  
23 the reality is still we never had a -- we went late after  
24 5:00 but we never went more than two days in any of these  
25 cases.

1           And you are not having to educate me from scratch.  
2       So I'm hopeful that you can actually do it in two and a half  
3       weeks and that be that. And that is what my expectation is.  
4       And if something goes completely off, then, you know, we'll --  
5       we're going to be -- I would, you know, ideally like to chat  
6       with you on the 15th so that -- because I'm going out of town  
7       after that.

8           So I mean, I can talk to you again the following  
9       week. I'm available. But we can -- I think we should try to  
10      have a phone conference or in-person conference -- we have the  
11      pretrial conference. We'll talk about the same things at that  
12      time about the time frame. You should be prepared to discuss  
13      that. And that is going to be in person and how it is going  
14      about the planning and the length of time, et cetera.

15           MR. CROSS: So, Your Honor, you're talking about the  
16      December 15 is in person?

17           THE COURT: Yes.

18           MR. CROSS: Okay. Great. Thank you.

19           MR. MILLER: Your Honor, I apologize. I think  
20      earlier -- did you say 10:30 on the 15th?

21           This is Carey.

22           THE COURT: I did.

23           Okay. Before somebody thinks of something new and  
24      bright and wonderful, I look forward to hearing about this --  
25      what happened on this dispute in connection with Doc. 1246 and

1 the examination of the malware so we can get that done this  
2 week.

3 And if you are -- why don't you let us know if there  
4 are any times on particular Friday afternoon you're not  
5 available.

6 You don't have to tell me. Tell Mr. Martin. It is  
7 like sending it into a hole to tell me.

8 MR. MILLER: Thank you, Your Honor.

9 THE COURT: All right.

10 MR. MILLER: If I can mention one thing on that topic  
11 that may short circuit the issue. If that is -- if our  
12 understanding or anticipation that that is the intention of  
13 that exhibit mentioned was -- if that is incorrect, then it may  
14 obviate the need to go back in detail. We're looking for  
15 whatever is coming on trial.

16 THE COURT: I'm not sure I understood what you said  
17 in terms of -- I tell you what. I think what you should do is  
18 this. You've looked at it. If you don't need to talk about it  
19 further because you either have a resolution or you're  
20 accepting something, communicate -- you know, just send -- file  
21 something that is very short in the record that reflects that.

22 Otherwise, figure out when you are talking to me on  
23 Friday.

24 MR. MILLER: Okay.

25 THE COURT: Thank you. Great. Thank you very much.

1           Anything -- I'm just going to look at my group to see  
2 if they have anything.

3           Thank you very much. Good luck. Take care.

4           MR. BROWN: Thank you, Judge.

5           MS. KAISER: Thank you, Your Honor.

6                   **(The proceedings were thereby concluded at 4:55**  
7                   **PM.)**



## C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 55 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 17th day of November, 2023.



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SHANNON R. WELCH, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
OFFICIAL CERTIFIED TRANSCRIPT

<p><b>LAW CLERK:</b> [1] 11/17</p> <p><b>MR. BELINFANTE:</b> [15] 8/3 11/4 14/14 14/18 26/8 26/18 30/15 33/19 34/22 35/7 36/5 36/25 38/22 38/25 39/10</p> <p><b>MR. BROWN:</b> [12] 5/1 14/6 21/17 34/13 34/16 35/1 36/8 41/12 44/18 45/22 50/8 55/4</p> <p><b>MR. CROSS:</b> [31] 4/14 6/12 6/19 6/23 8/17 9/13 10/11 10/18 12/15 12/18 14/24 19/21 22/10 25/12 25/23 30/24 31/23 35/15 38/4 39/12 39/16 39/20 42/17 49/15 49/18 50/2 51/6 51/19 52/11 53/15 53/18</p> <p><b>MR. MILLER:</b> [30] 5/18 7/19 9/1 10/7 10/12 10/15 11/11 11/22 12/11 13/3 18/4 18/7 18/20 24/19 25/5 25/8 25/18 27/13 27/25 29/1 43/13 43/15 43/19 44/4 50/18 51/12 53/19 54/8 54/10 54/24</p> <p><b>MR. RUSSO:</b> [3] 13/15 13/20 13/24</p> <p><b>MR. TYSON:</b> [17] 5/4 15/8 16/3 16/13 16/16 16/19 17/3 18/5 20/2 20/5 20/22 23/6 24/8 26/5 42/7 42/19 43/14</p> <p><b>MS. KAISER:</b> [21] 15/7 15/10 17/9 17/23 20/1 20/3 20/6 28/3 28/5 30/11 39/18 47/6 47/12 48/2 48/6 48/9 48/11 48/16 48/25 49/17 55/5</p> <p><b>MS. LaROSS:</b> [1] 3/5</p> <p><b>THE COURT:</b> [90]</p> <p>'</p> <p>'22 [2] 10/14 10/15</p> <p>-</p> <p>-- and [1] 16/13</p> <p>-- maybe [1] 27/25</p> <p>-- stand [1] 39/10</p> <p>-- unless [1] 25/6</p> <p><b>1</b></p> <p><b>100 percent</b> [3] 5/2 32/18 37/13</p> <p><b>10:30</b> [1] 53/20</p> <p><b>10:30 in</b> [1] 47/11</p> <p><b>11th</b> [5] 6/4 11/9 15/21 17/2 17/4</p> <p><b>1246</b> [2] 10/9 53/25</p> <p><b>12th</b> [4] 12/5 15/13 15/20 16/19</p> <p><b>1383</b> [1] 1/25</p> <p><b>13th</b> [2] 3/12 15/4</p> <p><b>14th</b> [1] 12/7</p> <p><b>15</b> [3] 1/13 3/2 53/16</p> <p><b>15-minute</b> [1] 49/3</p> <p><b>15th</b> [4] 16/23 47/9 53/6 53/20</p> <p><b>17th</b> [1] 56/13</p> <p><b>18th</b> [1] 6/5</p> <p><b>1:17-CV-2989</b> [1] 3/8</p> <p><b>1:17-CV-2989-AT</b> [1] 1/6</p> <p><b>2</b></p> <p><b>2016</b> [1] 34/10</p> <p><b>2017</b> [1] 34/10</p> <p><b>2018</b> [1] 38/10</p> <p><b>2019</b> [6] 22/16 22/24 35/17 35/25 36/2 38/1</p> <p><b>2022</b> [2] 10/13 39/23</p> <p><b>2023</b> [4] 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